

**UNITED STATES DISTRICT COURT
DISTRICT OF NEVADA**

UNITED STATES OF AMERICA,

Plaintiff,

v.

LAZAREO JONES,

Defendant.

Case No. 2:15-cr-00175-LDG (PAL)

ORDER

On June 17, 2015, the United States filed a Criminal Indictment alleging that the defendant, Lazareo Jones, violated 18 U.S.C. §1951(b)(3) by unlawfully attempting to commit a robbery by taking United States currency from an employee of a convenience store on June 19, 2010. Jones moves to dismiss the indictment (#19), arguing that the delay between the date of the alleged offense and the indictment violates his Fifth Amendment right to due process. The government opposes the motion (#20). Having considered the pleadings and arguments of the parties, the Court will grant the motion.

Background

In the early morning hours of June 17, 2010, Peter Stankiewicz and Oscar Caballero were working in a convenience store. According to Stankiewicz, a female entered the store and purchased some items. As she was leaving the store, a shirtless

1 male exited her vehicle and entered the store. The man walked to Stankiewicz's register
2 and asked for a pack of cigarettes. He then came around the counter and reached for the
3 cigarettes, at which time Caballero told the man that he needed to be on the other side of
4 the counter. The man, who had been smoking, extinguished his cigarette on the floor and
5 then put the cigarette butt in the trash. He then again reached for a pack of cigarettes.
6 Stankiewicz pulled the cigarettes from the man, and Caballero approached the man. The
7 man told Caballero, "Step back or step up," and "I got a pistol and will shoot both you
8 bitches." Caballero then punched the male, and the two stood ready to fight. The female
9 then stated, "They're calling the cops," and the man left in the car.

10 Caballero provided a more succinct statement of the events, first noting that a
11 shirtless male came around the corner [presumably of the counter] and said something to
12 the effect of "Give me the money out of the safe," and "I have a gun." Feeling that his life
13 was in danger, Caballero punched the man in the face, and both men put their hands up.
14 The male then ran out to the car and left.

15 In investigating the incident, the police collected a fingerprint from a pack of
16 cigarettes, a fingerprint from the counter, a cigarette butt from the trash, and video
17 surveillance of the incident (which, according to the officer, "shows the [suspect] step on a
18 cigarette & throw it into the business trash"). Despite obtaining the video surveillance, the
19 officer did not check it into evidence, and subsequently lost the tape. The officer did not
20 collect or impound the pack of cigarettes into evidence.

21 The Las Vegas Metropolitan Police Department's Forensic Laboratory performed an
22 analysis of DNA obtained from the cigarette butt. By report dated June 2011, the
23 laboratory concluded that the sample was consistent with an unknown male. The report
24 indicates the profile would be searched against local and national DNA databases, and that
25 notification would be provided if there was a match.

26 No effort was made to compare either of the collected fingerprints to anyone.

1 Sometime after November 3, 2014, the federal government collected a DNA sample
2 from Jones pursuant to his conviction for a federal offense. Jones' DNA profile was
3 submitted to the national DNA database in 2015. On March 25, 2015, the LVMPD
4 Forensic Laboratory reported (apparently to the original requesting police officer) a possible
5 match on the national DNA database between Jones and the DNA obtained from the
6 cigarette butt. The laboratory further indicated that an additional swab of Jones' DNA was
7 required to confirm the match. One month later, the officer informed the Forensic
8 Laboratory that the additional swab was "being handled by feds" because "[t]his case is
9 outside the statute of limitations for local police." Apparently, an additional swab was
10 obtained, as the Forensic Laboratory reported on May 26, 2015, that the DNA profile from
11 the recovered cigarette butt was consistent with Jones.

12 On June 17, 2015, two days shy of the federal five-year statute of limitations, the
13 government indicted the defendant for attempted robbery of U.S. currency.

14 Analysis

15 An indictment should be dismissed due to pre-indictment delay when a defendant
16 can show: (1) actual, non-speculative prejudice from the delay, and (2) that the delay, when
17 balanced against the reasons for it, offends "those fundamental conceptions of justice
18 which lie at the base of our civil and political institutions." *United States v. Sherlock*, 962
19 F.2d 1349, 1353-54 (9th Cir. 1989) (internal citations and quotation omitted). "The greater
20 the length of the delay and the more substantial the actual prejudice to the defendant
21 becomes, the greater the reasonableness and the necessity for the delay will have to be to
22 balance out the prejudice." *United States v. Mays*, 549 F.2d 670, 678 (9th Cir. 1977).

23 As the defendant notes, the pre-indictment delay could not have been longer. The
24 government filed the indictment two days shy of the five-year statute of limitations for a
25 violation of 18 U.S.C. §1951(b)(3). Jones argues that the government cannot show the
26 delay was reasonable or necessary, because the police collected fingerprints from the

1 cigarette box and the counter, but did not compare the fingerprints to anyone. He notes
2 that the police had previously obtained his fingerprints in connection with a 2008 arrest.

3 The government counters, however, that it indicted the defendant “almost
4 immediately after there was forensic evidence that [the defendant] had committed the
5 crime.” The forensic evidence to which the government refers is the unidentified DNA
6 sample from the cigarette butt that did not result in a possible match on the national DNA
7 database until March 2015. The match didn’t occur until 2015 because Jones’ DNA was
8 not collected and submitted to the national database until, and pursuant to, his November
9 2014 federal conviction. The government concedes that the fingerprints were not
10 submitted for comparison, but dismisses the failure due to the low priority of the case and
11 the resource management policies of the police.

12 The reasonableness of the delay between offense and indictment is not measured
13 solely by the length of time between the event establishing the defendant was at the scene
14 of the alleged crime and the indictment. The reasonableness of the delay must be
15 considered in the light of the period of time between the alleged offense and the
16 indictment, and must be considered in the context of events occurring during that period.
17 While the DNA match in March 2015 between Jones and the DNA on the cigarette butt
18 provided a new lead regarding the suspect committing the alleged offense, the possible
19 identification of the suspect was not limited to the DNA sample. The police collected two
20 fingerprints possibly related to the alleged crime. However, a decision was made to not
21 pursue further investigation of that evidence because, as suggested by the government,
22 the matter had a low priority.

23 Whether a delay is reasonable is also determined by reference to efforts to mitigate
24 the potential adverse effects of an ongoing delay. Or, in the context of the present matter,
25 reasonableness is determined by reference not simply to the lack of effort, but in
26 considering the consequences of that lack of effort. Consistent with the “low priority” given

1 to investigating the underlying incident, the police officer investigating this incident did not
2 make any effort to preserve the pack of cigarettes, an item central to the witness statement
3 of Stankiewicz. More critically, however, the officer made no effort to preserve the video
4 surveillance of the incident that he had obtained. The video was not checked into
5 evidence. A chain-of-custody was never created. Rather (and consistent with the low
6 priority given to the investigation), the officer misplaced and lost the video surveillance.
7 Once lost (an event that occurred at some unknown time), prosecution and defense of this
8 matter became limited to memory and the impact of time on memory.

9 Another factor pertinent to a determination whether the delay was reasonable is the
10 consideration of the matter being prosecuted and the evidence supporting the indictment.
11 The government indicted the defendant for attempting to rob U.S. currency. In opposing
12 Jones' motion to dismiss, however, the government never expressly identifies U.S.
13 currency as the object of the robbery. While Caballero stated that the suspect said words
14 to the effect of "[g]ive me the money out of the safe," the government merely notes
15 "Caballero described an attempted robbery." As to Stankiewicz, the government is
16 constrained to argue that he "stated the robber attempted to take cigarettes." As a result,
17 the government does not argue, nor could it reasonably argue, that the two witnesses
18 provided consistent statements as to what the suspect was attempting to rob.

19 The Court also does not share the government's confidence that Stankiewicz
20 described, "in no uncertain terms," an attempt by a robber to take cigarettes. While it may
21 be arguable that Stankiewicz was describing a robbery, it is also arguable that Stankiewicz
22 was describing an impatient customer who was attempting to reach the cigarettes he had
23 previously asked for and wanted to buy. Those efforts were interrupted by a co-worker
24 who, along with the male, escalated the matter to a fight because the customer stepped
25 around the counter to serve himself.

1 Further, though the video surveillance has been lost, the investigating officer wrote
2 in his report that the video shows the suspect extinguishing a cigarette on the floor and
3 then throwing the butt into the trash. That the suspect (as apparently shown on the lost
4 video) took the time, in the middle of the events at issue, to extinguish a cigarette and
5 place the butt into the trash, further suggests that Stankiewicz was not describing a
6 robbery, but a customer impatient to buy his next pack of cigarettes. Even accepting the
7 government's suggestion that Stankiewicz was describing a robbery, the evidence that
8 remains in this case is not only inconsistent as to the object of the robbery, but is most
9 consistent with that object being a pack of cigarettes.

10 The low priority given this case not only potentially delayed the identification of
11 Jones as a person who was at the scene of the alleged crime, but demonstrated itself in
12 both the lack of effort to preserve evidence and to maintain evidence. The cumulative
13 impact of the initial limited investigation and the failure to collect and preserve evidence
14 greatly shortened the time in which a delay in indictment could be considered reasonable.
15 This delay has occurred in the federal prosecution of a low-priority matter that, arguably,
16 concerns the defendant stepping around a counter to reach for the pack of cigarettes,
17 cigarettes he had just requested of the clerk. In light of these circumstances, the delay in
18 bringing an indictment until two days short of the federal statute of limitations, and nearly
19 two years past the state statute of limitations, was unreasonable.

20 The Court also concludes that the defendant has been prejudiced by the delay. The
21 most obvious prejudice results from the loss of the video surveillance. The defendant
22 argues the surveillance would be exculpatory. The government counters that the
23 defendant has not identified any actual, non-speculative prejudice, and cannot provide
24 actual proof that the video surveillance would be exculpatory. The Court must note,
25 however, that the lack of any such proof is the result of the lack of care of the investigating
26 police officer to preserve the video surveillance as evidence of the events that occurred on

1 June 19, 2010. As a result of the loss of the video surveillance, and as a result of the delay
2 in indicting the defendant, the defense of this matter is necessarily limited to memories that
3 are now more than five years old, and the then-recorded statements of the clerks.

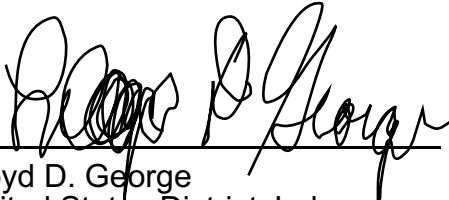
4 As noted previously, however, the recorded statements of the two witnesses
5 disagree even as to the arguable object of the alleged attempted robbery. The only
6 evidence as to the content of the video is consistent with the statement of Stankiewicz, and
7 that statement is more favorable to the defendant than Caballero's statement. The lack of
8 care taken by the police to preserve the video as evidence further suggests that the content
9 of the video would have been more favorable to the defendant than to the prosecution,
10 supporting a determination that the video would have been exculpatory.

11 In sum, the lack of care and priority given by the police to investigating and
12 preserving evidence suggests the police considered the matter to concern, at most, an
13 event unworthy of further investigation or effort. In light of the totality of the circumstances,
14 including the lack of agreement by the witnesses as to the object of the robbery, the lack of
15 care in preserving evidence, the low priority in investigating the matter, and that the only
16 indication regarding the content of the video suggests the video would support a witness
17 statement that arguably favors the defendant, the Court concludes that the defendant has
18 shown actual, non-speculative prejudice from the delay in indicting him, and that the delay
19 was unreasonable.

20 Accordingly,

21 THE COURT **ORDERS** that Defendant's Motion to Dismiss (#19) is GRANTED.

22 DATED this 10 day of November, 2015.

23
24 
25 Lloyd D. George
26 United States District Judge